Docket: 2016-2749(IT)I

BETWEEN:

KYLE BAILEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 14, 2016, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	James Lhalungpa

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the Appellant's 2010 taxation year is dismissed.

The appeal from the assessment made under the *Income Tax Act* for the Appellant's 2012 taxation year is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is liable for penalty pursuant to subsection 162(1) of the *Income Tax Act*.

Signed at Ottawa, Canada, this 13th day of February 2017.

"V.A. Miller"

V.A. Miller J.

Citation: 2017TCC24
Date: 20170213
Docket: 2016-2749(IT)I

BETWEEN:

KYLE BAILEY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in this appeal is whether the Appellant is liable to pay the amount of $11,817.32 and $710.58 in respect of penalties under subsection 162(2) of the *Income Tax Act* (the "*Act*") for his 2010 and 2012 taxation years respectively.

Preliminary Matter

[2] At the beginning of the hearing, counsel for the Respondent brought a motion to file an Amended Reply. The Appellant had been given three weeks' notice of the Respondent's motion and he did not oppose it. I allowed the Amended Reply to be filed.

[3] The witnesses at the hearing were the Appellant and Katrina Abesamis, an Appeals Officer with the Canada Revenue Agency.

[4] The Appellant is a self-employed computer consultant.

Burden of Proof

[5] In the case of penalties, the burden of proof is on the Respondent to show that they were properly imposed. That burden can be discharged if the Respondent can show that the conditions in subsection 162(2) have been met. With respect to the 2010 taxation year, that provision read:

Failure to file return of income

162 (1) Every person who fails to file a return of income for a taxation year as and when required by subsection 150(1) is liable to a penalty equal to the total of

(a) an amount equal to 5% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and

(b) the product obtained when 1% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 12, from the date on which the return was required to be filed to the date on which the return was filed.

Marginal note: Repeated failure to file

(2) Every person

(a) who fails to file a return of income for a taxation year as and when required by subsection 150(1),

(b) on whom a demand for a return for the year has been served under subsection 150(2), and

(c) by whom, before the time of failure, a penalty was payable under this subsection or subsection 162(1) in respect of a return of income for any of the 3 preceding taxation years

is liable to a penalty equal to the total of

(d) an amount equal to 10% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed, and

(e) the product obtained when 2% of the person's tax payable under this Part for the year that was unpaid when the return was required to be filed is multiplied by the number of complete months, not exceeding 20, from the date on which the return was required to be filed to the date on which the return was filed.

[6] Effective June 29, 2012, paragraph 162(2)(b) was amended so that a demand letter did not have to be "served" by registered mail but could be sent to the taxpayer by ordinary mail.

[7] The Respondent must demonstrate that the following conditions are satisfied in order for subsection 162(2) to apply:

(a) The Appellant failed to file his tax returns for the 2010 and 2012 taxation years within the deadline specified in subsection 150(1);

(b) A demand was served on the Appellant for the 2010 taxation year and a demand was sent to the Appellant for the 2012 taxation year;

(c) The Appellant must have been assessed a penalty under subsection 162(1) or 162(2) for any of the three preceding years.

[8] The Respondent satisfied the conditions in paragraphs 7(a) and (c) by cross-examination of the Appellant. The Appellant agreed that his 2010 and 2012 income tax returns were required to be filed on April 30, 2011 and April 30, 2013. He admitted that he owed federal tax at the time these returns were required to be filed and that he did not file his 2010 return until April 21, 2015 and his 2012 return until May 4, 2015. He also admitted that he filed his 2009 return late on April 21, 2015 and he was assessed a penalty under subsection 162(1) of the *Act*.

[9] However, the Appellant stated that he was not liable to a penalty under subsection 162(2) because he did not receive a demand to file his 2010 and 2012 returns. He argued that consequently, the Minister did not have the authority to assess penalties.

[10] With respect, there is no requirement in subsection 162(2) or in the *Act* that the taxpayer must receive the demand letter: *Bowen v Minister of National Revenue*, [1991] 2 CTC 266 at paragraph 7. The requirement is that the Minister must serve or send the demand letter, depending on the year at issue.

[11] Katrina Abesamis testified that when actions are taken by the Canada Revenue Agency (the "CRA") to have a taxpayer file his return, those actions are recorded in the CRA computer in a file called "Enforcement Action". She obtained the Appellant's records for the 2007 to 2012 taxation years inclusive.

[12] Ms. Abesamis reviewed each entry in the Enforcement Action. She stated:

(a) A demand to file his 2007 tax return was issued to the Appellant on April 26, 2010. He filed his 2007 return on January 28, 2011 and he was assessed on March 14, 2011.

(b) A demand to file his 2008 tax return was issued on April 20, 2010. The Appellant filed his 2008 tax return on January 28, 2011 and he was assessed on March 14, 2011.

(c) A demand to file his 2009 tax return was issued to the Appellant on July 21, 2010. He did not file his 2009 return in a reasonable time and he was arbitrarily assessed pursuant to subsection 152(7) on April 14, 2011.

(d) A demand letter was issued on February 2, 2012 to the Appellant to file his 2010 tax return within 30 days of the date on the letter. The Appellant did not file his 2010 return until April 22, 2015 and he was assessed on May 28, 2015.

(e) There was no demand letter issued to the Appellant for his 2011 year. However, he did not file his 2011 return until May 25, 2015.

(f) A demand letter to file his 2012 return was issued to the Appellant on February 20, 2014. He filed his 2012 return on May 25, 2015 and he was assessed on July 30, 2015.

[13] Ms. Abesamis stated that the demand letter with respect to the Appellant's 2010 taxation year was sent by registered mail. She requested proof of delivery of the demand letter from Canada Post ("CP"). The CP document (exhibit R-2) showed that an item was delivered to K Bailey on February 6, 2012. The item number on the CP document matched the number on CRA's records of registered mail sent to the Appellant. The item was sent to 1966 Hillside Avenue which is the Appellant's address. He said that he has lived at this address for 15 years.

[14] Ms. Abesamis stated that, in 2010, the only other mail that the CRA sent by registered mail was a notice of confirmation. The CRA records disclosed that the Appellant did not send a notice of objection until October 27, 2015. This objection was confirmed on April 7, 2016. Therefore, the registered mail documented by exhibit R-2 had to be the demand letter for the 2010 year which was sent to the Appellant on February 2, 2012.

[15] The Appellant stated that the signature on exhibit R-2 was not his. However, I am satisfied that the Minister served the demand letter on the Appellant for his 2010 year by registered mail.

[16] With respect to the demand letter for the 2012 year, Ms. Abesamis stated that CRA's records show that a demand was sent and there was nothing in the

records to show that it was returned. If it had been returned, there would have been a note to that effect in the Appellant's records.

[17] It is my view that Ms. Abesamis' testimony did not satisfy the Respondent's burden of proving that a demand letter was sent to the Appellant for his 2012 year. Rather, it begs the question.

[18] The Respondent ought to have brought evidence similar to that described by Bowman J. at paragraph 23 in *Schafer v R*, [1998] GSTC 60. He wrote:

> 23 In a large organization, such as a government department, a law or accounting firm or a corporation, where many pieces of mail are sent out every day it is virtually impossible to find a witness who can swear that he or she put an envelope addressed to a particular person in the post office. The best that can be done is to set out in detail the procedures followed, such as addressing the envelopes, putting mail in them, taking them to the mail room and delivering the mail to the post office.

[19] Justice Bowman's observations were approved by Rothstein J.A. in *Kovacevic v The Queen*, 2003 FCA 293 at paragraph 16. He stated:

> 16 I accept that when legislation requires that documents be sent by a large organization such as a government department by ordinary mail, but does not require registered or certified mail or evidence of a more formal means of sending, the observation of Bowman J. in *Schafer* is reasonable. Generally, it would be sufficient to set out in an affidavit, from the last individual in authority who dealt with the document before it entered the normal mailing procedures of the office, what those procedures were.

[20] However, this is not the end of the matter. In its Amended Reply, the Respondent relied on the alternative ground that the Appellant is liable for a penalty in respect of subsection 162(1) for his 2010 and 2012 taxation years.

[21] The Appellant admitted that he failed to file his 2012 return as and when required by subsection 150(1) of the *Act* and that there was unpaid federal tax when the 2012 income tax return was required to be filed.

[22] There was no evidence to demonstrate that the Appellant exercised due diligence in 2010 or 2012. In fact, the contrary was true. The Appellant stated that when he received the "brown envelopes" from the CRA, he didn't open them. He tossed them into a container until the Minister seized funds from his bank account.

It was only then that he took his documents to his accountant to have his tax returns prepared.

[23] The appeal for the 2010 taxation year is dismissed. The appeal for the 2012 taxation year is referred back to the Minister for reconsideration and reassessment on the basis that the Appellant is liable for penalty pursuant to subsection 162(1) of the *Act*.

Signed at Ottawa, Canada, this 13th day of February 2017.

"V.A. Miller"

V.A. Miller J.

CITATION:	2017TCC24
COURT FILE NO.:	2016-2749(IT)I
STYLE OF CAUSE:	KYLE BAILEY AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 14, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	February 13, 2017

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	James Lhalungpa

COUNSEL OF RECORD:

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Name:

Firm:

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